

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:

FRED E. SCHOONOVER,

Debtor(s).

In Proceedings
Under Chapter 13

Case No. 01-40217

OPINION

This matter is before the Court on the debtor's motion under § 522(f) to avoid the judicial lien of creditor, Edward Karr, on the debtor's exempt property. The property in question consists of the debtor's checking and savings accounts and certificates of deposit ("CD's") held in the Bank of Herrin. The debtor claims such funds as exempt and contends that the pre-bankruptcy garnishment of the Bank of Herrin accounts and CD's by judgment creditor Karr created a judicial lien that may be avoided under § 522(f).¹

¹ Section 522(f)(1)(A) of the Bankruptcy Code provides in pertinent part:

[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien i debtor would have been entitled . . . if such lien is--

(A) a judicial lien

11 U.S.C. § 522(f)(1)(A) (emphasis added).

Under Illinois law, service of a citation in a garnishment action to enforce a judgment creates a lien against property belonging to the judgment debtor. See 735 Ill. Comp. Stat. 5/2-1402(m).

The creditor, objecting to the debtor's motion, argues that there is no basis for the debtor's claim of exemption in the garnished funds. Accordingly, he asserts that § 522(f) does not apply and that the Court should deny the debtor's motion to avoid lien.

The debtor's schedule C lists exempt property consisting of a Bank of Herrin checking account in the amount of \$19,003.74; a savings account in the amount of \$7,886.82; two CD's of \$5,000; and four CD's of \$10,000. The debtor claims these accounts and CD's as exempt under 735 Ill. Comp. Stat. 5/12-1001(g)(1), (2), and (3), pertaining to a debtor's "right to receive" social security benefits, veteran's benefits, and disability benefits, respectively.² The debtor further claims these funds as exempt under the "retirement plan" exemption of 735 Ill. Comp. Stat. 5/12-1006.³

² Section 12-1001(g) provides an exemption in property including:

(g) [t]he debtor's right to receive:

- (1) a social security benefit . . . ;
- (2) a veteran's benefit; [and]
- (3) a disability . . . benefit[.]

735 Ill. Comp. Stat. 5/12-1001(g)(1),(2),(3).

³ Under § 12-1006, a debtor may exempt "an interest in or right to" assets held in a retirement plan

The debtor receives three monthly payments consisting of social security benefits, veteran's pension or "military retirement" benefits, and disability benefits. He alleges that, over a period of years, he has deposited these payments in the Bank of Herrin and that the financial accounts in question consist of the accumulated payments from these sources. Accordingly, he asserts, the accounts are fully exempt under § 12-1001(g) and § 12-1006 because they represent social security, veteran's pension, and disability benefits.

At hearing, the debtor offered testimony to show that the checking and savings accounts and CD's derived solely from the debtor's social security, veteran's pension, and disability benefits. The Court, noting that the testimony of the witnesses was conflicting concerning the sources of the funds in the savings account and CD's, found the evidence to be insufficient to show that the debtor's savings account and CD's consisted solely of social security, pension, and disability benefits. Accordingly, the Court ruled, the debtor is not entitled to exempt such funds as claimed on Schedule C, and the motion to avoid lien under § 522(f) must be denied with regard to those

if the plan (i) is intended in good faith to qualify as a retirement plan under applicable provisions of the Internal Revenue Code of 1986

735 Ill. Comp. Stat. 5/12-1006.

funds.

However, the Court further found that the evidence was sufficient to show that the checking account in the amount of \$19,003.74 consisted of accumulated social security, pension, and disability benefits that had been received by the debtor and deposited directly into his checking account. The Court reserved ruling as to whether the debtor was entitled to exempt these funds under § 12-1001(g) and § 12-1006.

Having reviewed the relevant statutory and case law, the Court concludes that the debtor's claim of exemption in the Bank of Herrin checking account is without merit. While § 12-1001(g) exempts a debtor's present "right to receive" social security, veteran's pension, and disability benefits, the checking account at issue represents property that derives from and is traceable to the benefits received by the debtor. Section 12-1001(g), by its terms, contains no tracing provision.⁴ See Fayette County Hospital v. Reavis, 523 N.E.2d 693, 695 (Ill. App. Ct. 1988). The creditor in this case is not attempting to attach the debtor's social security, pension, and disability benefits as

⁴ As noted by the Reavis court, the only tracing provision in § 12-1001 is found in subsection (h), where the legislature expressly exempts a "debtor's right to receive, or property that is traceable to" certain awards and payments. 735 Ill. Comp. Stat. 5/12-1001(h) (emphasis added); see Reavis, at 695.

they are received but, rather, has garnished the debtor's checking account into which such funds have been deposited. In the absence of a provision extending the debtor's exemption to property which is traceable to the debtor's social security, pension, and disability benefits, the Court must conclude that the Illinois legislature did not intend to exempt property traceable to such benefits. See Reavis at 695. Accordingly, the exemption under § 12-1001(g) does not apply to the accumulated benefits in the debtor's checking account, and the debtor is not entitled to exempt the \$19,003.74 checking account under this section.

In Reavis, relied upon by the debtor, the court found that a certificate of deposit purchased with the judgment debtor's social security funds was not exempt under § 12-1001(g) because that section contains no tracing provision. Id. at 695. The court noted, however, that § 407(a) of the Social Security Act⁵ contains such a tracing provision with regard to social security

⁵ Section 407(a) provides in pertinent part:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, . . . and none of the moneys paid or payable . . . under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process

42 U.S.C. § 407(a) (emphasis added).

benefits. Id. at 695-96. The Reavis court ruled, therefore, that the debtor's certificate of deposit could be exempted under § 407(a) because the evidence in that case showed that the funds in the debtor's certificate of deposit were derived solely from his social security benefits. Id. at 696.

In this case, the debtor has made no claim of exemption under § 407(a). Even if the Court were to consider the debtor's right to exempt the \$19,003.74 checking account under § 407(a), the evidence shows that the checking account of the debtor is comprised, not only of social security benefits as in Reavis, but of veteran's pension and disability benefits as well. The present case, therefore, is distinguishable from Reavis on its facts. In addition, while the debtor might have asserted that his veteran's pension and disability benefits qualify for an exemption under federal law that would extend to the monies held in the debtor's checking account, the Court has been provided with no information concerning either the statutory basis for such benefits nor any applicable exemption for monies derived from such benefits. In the absence of such information, the Court will not speculate concerning either the type of benefits involved or the exemptibility of the debtor's checking account into which the benefits have been deposited. Accordingly, the debtor's claim that the checking account comprised of social

security, veteran's pension, and disability benefits is exempt based on the court's decision in Reavis is not well-taken.

The debtor additionally claims that the funds in his checking account are exempt under § 12-1006, the Illinois exemption for tax-qualified retirement plans. The Court finds no basis for the debtor's claim under this section, as § 12-1006, on its face, applies to retirement plans that comply with the requirements of the Internal Revenue Code for special tax treatment. See In re Ellis, No. 01-42090, slip op. at 8 (Bankr. S.D. Ill. March 4, 2002). The debtor's account consisting of social security, veteran's pension, and disability benefits does not constitute such a retirement plan.

The case of Auto Owners Ins. v. Berkshire, 588 N.E.2d 1230 (Ill. App. Ct. 1992), relied upon by the debtor, is distinguishable from the present case because the funds in the checking account in Berkshire consisted of "proceeds from a payout . . . of retirement benefits paid to [the defendant] by his former employer." 588 N.E.2d at 696. In this case, the debtor apparently finds support for his position in the Berkshire court's statement that § 12-1006 applies to "proceeds traceable to pension plan payments." Id. at 698. However, for "tracing" to be an issue, the funds in the debtor's checking account must derive in the first instance from a qualified retirement plan. The debtor has made no such showing here, as the funds in his

checking account were paid as social security, veteran's pension, and disability benefits, not from a retirement plan. Accordingly, the debtor's reliance on Berkshire is misplaced.

For the reasons stated, the Court finds that the funds in the debtor's checking account are not exempt under either § 12-1001(g) or § 12-1006. Accordingly, § 522(f) does not allow the debtor to avoid the lien of creditor, Edward Karr, as impairing an exemption to which the debtor would be entitled. The Court, therefore, will sustain the creditor's objection to the motion and deny the debtor's motion to avoid lien.

SEE WRITTEN ORDER.

ENTERED: **March 11, 2002**

/s/ Kenneth J. Meyers
United States Bankruptcy Judge